

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

AMERICAN WILD HORSE CAMPAIGN	)	
4115 Jalama Road	)	
Lompoc, CA 93246,	)	
	)	
ROBERT HAMMER	)	
2852 S. 2000 W.	)	
Syracuse, UT 84075,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. No.
	)	
DAVID BERNHARDT, Secretary	)	
U.S. Department of Interior	)	
1849 C Street N.W.	)	
Washington, D.C. 20240,	)	
	)	
WILLIAM PERRY PENDLEY, Acting Director,	)	
U.S. Bureau of Land Management	)	
1849 C Street N.W.	)	
Washington, D.C. 20240	)	
	)	
Defendants.	)	

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**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

1. This case challenges the decision by the Interior Department’s Bureau of Land Management (“BLM”) under the Wild Free-Roaming Horses and Burros Act (“Wild Horse Act” or “WHA”), 16 U.S.C. §§ 1331–1340, to round up wild horses from the Confusion Herd Management Area (“HMA”) in Utah and permanently sterilize mares through ovariectomy via colpotomy—an inhumane, outdated, and extremely controversial procedure that involves reaching inside a mare through an incision in its vagina, blindly locating the mare’s ovaries by touch alone, and severing the organs with a length of chain to remove them. Despite the fact that

BLM's own governing Resource Management Plan ("RMP") does not authorize the agency to use permanent sterilization to manage the wild horse population in this HMA, and notwithstanding that the agency has neglected the RMP's mandate to prepare a Herd Management Area Plan ("HMAP") to guide management in this HMA, the agency nonetheless elected to fundamentally alter its longstanding practice of managing reproducing, self-sustaining wild horse populations in this HMA, and instead to permanently sterilize wild horses through an inhumane, obsolete, and highly controversial surgical procedure. In doing so, the agency also reversed its own previous approach to this very same surgical procedure in which the agency previously stressed the need to consider this procedure's "social acceptability" and repeatedly decided it was necessary to conduct scientific experiments to determine the procedure's impacts on individual horses and wild horse herds. Likewise, the agency imposed arbitrary and unreasonable limits on the public's ability to observe the agency's treatment of these statutorily protected animals. Moreover, the agency made these decisions without meaningfully responding to public input, without seriously considering the scientific controversy about this procedure, and without taking a hard look at the procedure's impacts on individuals and herds. In making this decision, BLM violated the Federal Lands Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701–1787, the Wild Horse Act, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4347, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2).

### **JURISDICTION AND VENUE**

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.
3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because defendant DOI, the parent agency ultimately responsible for the decisions at issue, is located in

Washington, D.C., and because the decision at issue has nationwide implications that make judicial review in this forum appropriate.

4. Plaintiffs have reason to believe that if BLM is permitted to conduct these procedures in the Confusion HMA, it will rely on this action as precedent to support future use of this procedure across the country. As an initial matter, BLM's previous decisions to conduct experiments on ovariectomy via colpotomy, and to consider the procedure's social acceptability, were made in Oregon, before BLM withdrew those decisions in light of challenges from Plaintiff American Wild Horse Campaign. Additionally, BLM has also authorized the use of this procedure in a recent RMP revision in Idaho. Now, BLM has chosen to implement the procedure for the first time as a population management tool in the Confusion HMA which is located in Utah. Further, in making the decision at issue, BLM has relied on findings regarding this procedure from a National Wildlife Refuge in Nevada. Accordingly, BLM's previous and current efforts to sterilize wild horses using ovariectomy via colpotomy reveal that the agency intends to use the procedure across the country.

5. Moreover, confirming the nation-wide character of BLM's decisions on sterilizing wild horses, including through ovariectomy via colpotomy, BLM previously informed the U.S. Court of Appeals for the Tenth Circuit in a sworn declaration that the agency would prepare a "national Programmatic Environmental Impact Statement" to "evaluate a wide range of management scenarios that will include the use of spay/neuter methods" such as the procedure the agency has now elected to implement. Likewise, in 2019, the Department of the Interior ("DOI") released a Notice of Proposed Rulemaking in which the agency proposed to address wild horse and burro management challenges nationwide through actions such as "managing for

nonreproducing herds.” The rule remains an agency priority as it was updated with the White House's Fall 2020 Unified Agenda of Regulatory and Deregulatory Actions.

6. Additionally, BLM’s response to Plaintiff AWHC’s comments on the proposed action support venue in the District of Columbia as well. Of note, BLM states that “[s]terilization is authorized in the [WHA];” meaning that BLM’s authority to manage wild horses both generally and in this manner originates from an act of Congress – the WHA. BLM ignored, however, the WHA’s plain language requiring the agency to consult with experts in wild horse protection, including experts identified by the National Academy of Sciences, in making any determination to sterilize wild horses. Moreover, in both 2019 and 2020, a bipartisan, bicameral group of U.S. Representatives—representing numerous different states—sent letters to Secretary of the Interior David Bernhardt directing him to abandon the agency’s pursuit of ovariectomy via colpotomy on wild horses. Additionally, earlier this year, the U.S. House of Representatives passed a historic wild horse-related amendment to the Fiscal Year Appropriations House Bill which directed the BLM to focus a large part of its management activities on humane, reversible fertility control, not permanent sterilization like ovariectomy via colpotomy. This current controversy over national policy regarding wild horses again confirms that the actions challenged here have implications across the country and are appropriate for resolution in this forum.

7. Thus, the District of Columbia is the appropriate venue for this litigation not only as the headquarters of DOI, the parent agency of BLM and, accordingly, the agency ultimately responsible for the decision challenged here, but also because District of Columbia is the central venue for overarching wild horse management decisions. BLM’s plan to permanently, invasively, and irreversibly sterilize wild mares in the Confusion HMA is an outlier, a stark and abrupt departure from the agency’s well-established national policy to roundup, remove, and

hold wild horses and burros off-range. Therefore, despite the action at issue taking place outside of the District of Columbia, such a precedent setting departure by the BLM in Utah will undoubtedly impact the national policy of the BLM's Wild Horse and Burro Program. As such, the decision at issue is appropriately addressed in the parent agency's home venue of the District of Columbia.

8. In sum, BLM's prior conduct and program decisionmaking, and specifically that with regard to ovariectomy via colpotomy, reveals that the agency has been, and is currently, engaged in a nationwide effort to utilize this inhumane procedure to permanently sterilize wild mares. Because the issues in this case thus have a nationwide history and nationwide implications, venue in the District of Columbia is appropriate.

### **PARTIES**

9. Plaintiff American Wild Horse Campaign ("AWHC") is a 501(c)(3) non-profit organization that is the nation's leading voice on protecting wild mustangs and burros. AWHC's broad base of one million supporters and followers, including public-interest groups, environmentalists, and humane organizations, enjoy viewing wild horses on public lands, including in the Confusion HMA. AWHC submitted comments on BLM's draft Environmental Assessment ("EA") for the Confusion HMA Wild Horse Gather Plan. In those comments, AWHC advised BLM that the agency would need to revise its badly outdated RMP before undertaking the actions the agency proposed, and would also need to prepare a detailed Environmental Impact Statement ("EIS") both as a prerequisite for the revision of the RMP and because the proposed actions will have "significant" environmental impacts within the meaning of NEPA. Likewise, AWHC's comments informed the agency that it would need to prepare an HMAP to guide management in this HMA, as the agency's own RMP expressly obligated the

agency to do. AWHC's comments also stressed the need for independent, impartial observation of BLM's treatment of federally protected wild horses and offered reasonable means to accommodate this need, including providing for an independent, licensed veterinarian to observe the agency's surgical procedures and identifying small, unobtrusive cameras that AWHC would provide, install, and remove at its own expense.

10. BLM's decision to remove numerous wild horses from the Confusion HMA, and to permanently surgically sterilize a significant portion of the horses the agency returns to the range, harms AWHC's organizational interest and the interests of its supporters in protecting and preserving wild horses in this HMA and the horses' natural, wild, free-roaming behavior and welfare, as well as the aesthetic and recreational interests of AWHC's supporters in observing wild horses engaged in their natural behaviors on these public lands.

11. BLM's decision to impose serious limits on observation of its treatment of wild horses also harms AWHC's established interest in providing the public with an independent account of how the agency is implementing its statutory duties under the WHA. Independently documenting BLM's treatment of wild horses is one of the principal tools that AWHC has used, and continues to use, to raise public awareness of BLM's treatment (or mistreatment) of federally protected wild horses and to identify the need for laws and regulations that would better effectuate Congress's goal of protecting these animals. AWHC has regularly sent observers to document BLM's treatment of wild horses during BLM roundups, including the currently challenged roundup in the Confusion HMA, and has used the resulting observations and footage to effectively advocate for greater protections for these animals. Each time that BLM has previously decided to surgically sterilize wild mares through ovariectomy via colpotomy, AWHC has sought access to observe and document these procedures, although BLM has

withdrawn each such decision rather than allow for any meaningful, independent oversight of its treatment of wild horses.

12. AWHC has been repeatedly forced to spend significant organizational resources monitoring, commenting on, opposing, and challenging in court, BLM's attempts to fundamentally alter its management of wild horse populations by implementing ovariectomy via colpotomy as a tool to permanently surgically sterilize wild mares. In 2016, AWHC filed a lawsuit challenging BLM's first effort to use this procedure to surgically sterilize wild horses as part of an experiment on the procedure's efficacy and social acceptability. After AWHC sought a preliminary injunction in that case, arguing that, among other legal violations, BLM's refusal to allow for any independent public observation violated AWHC's constitutional rights, BLM abandoned this experiment. *See Kathrens v. Zinke*, No. 2:16-cv-01650 (D. Or. 2016). In 2018, BLM announced another set of experiments on wild mares in Oregon, again aiming to evaluate the efficacy of ovariectomy via colpotomy, the procedure's impacts on mares in various stages of pregnancy, and how many mares would die or abort their foals, and proposing to evaluate the procedure's behavioral impacts through observation of sterilized mares returned to the range. However, in spite of comments from AWHC stressing that the agency must also consider the procedure's social acceptability as it previously recognized was necessary in 2016, and again calling for the agency to provide for meaningful opportunities for public observation, the agency's decision to conduct experiments on this procedure in 2018 failed to take social acceptability into consideration and again refused to provide any constitutionally adequate level of independent public observation. Accordingly, AWHC was again forced to file another lawsuit and obtain a preliminary injunction to preserve its rights. *See Kathrens v. Bernhardt*, No. 3:18-cv-01691 (D. Or. 2018). The U.S. District Court for the District of Oregon granted a preliminary

injunction, finding that the agency's action likely violated the First Amendment of the U.S. Constitution by failing to provide any adequate level of public observation of its treatment of federally protected wild horses, and likely violated the APA by jettisoning without any rational explanation the agency's prior inquiry into the social acceptability of this method of surgically sterilizing wild mares. *Id.* ECF No. 24. Rather than litigate the merits of the claims in that case or conduct its ovariectomy experiments while providing the level of public observation that the District of Oregon explained would satisfy the First Amendment, BLM again withdrew the decision to conduct those procedures. However, while that case was still pending, BLM announced yet another proposal to conduct substantially similar experiments in Oregon without any adequate public observation or any consideration of social acceptability. AWHC opposed this third round of proposed experiments on ovariectomy in public comments on a draft EA. BLM then abandoned its third proposal to conduct experiments on ovariectomy via colpotomy in Oregon. BLM has thus withdrawn three previous decisions or proposals to conduct experiments on ovariectomy via colpotomy rather than allow the public to witness its treatment of federally protected wild horses or consider whether the public would deem the agency's actions socially acceptable, in line with the values and purposes fostered by the WHA.

13. In each of the three previous instances in which BLM has proposed to conduct experiments on the sterilization of wild horses through ovariectomy via colpotomy only to withdraw its decisions or proposals in the face of widespread public opposition, AWHC has been forced to divert significant organizational resources from other activities critical to AWHC's mission. AWHC is engaged in several other efforts to promote wild horses' fair allocation of range resources and to stabilize wild horse populations in a humane, effective, and economical manner. For example, AWHC expends resources to administer a temporary, reversible



contraceptive known as Porcine Zona Pellucida (“PZP”) in order to demonstrate that this alternative form of fertility control is humane, effective, and economical; indeed, AWHC is in discussion with BLM in Nevada to implement a program to use PZP to stabilize wild horse populations in an HMA in that state. Likewise, AWHC has expended significant institutional resources to secure state funding for the study and development of another form of fertility control for mares that is permanent but that is far less invasive and far more humane than ovariectomy via colpotomy and that has vastly reduced impacts on wild horse physiology and behavior. AWHC has also devoted significant resources to rangeland improvement projects in partnership with supporters who own private lands on or near HMAs in order to ensure that wild horses continue to enjoy sufficient resources to allow them to remain on the range sustainably over the long term. However, when BLM issues decisions—such as the decision challenged in this case—to manage wild horse populations through means that are inhumane, obsolete, and have profound adverse impacts on the behavior of individual horses and herds, AWHC is forced to divert resources away from these other missions and instead expend resources opposing BLM’s inhumane and arbitrary activities.

14. In the past three instances in which BLM has decided or proposed to implement ovariectomies via colpotomy in Oregon, AWHC has been forced to expend significant organizational resources opposing these decisions and proposals through public outreach and education, detailed comments during the agency’s administrative process, outreach to elected officials, and eventually litigation. Likewise, BLM has proposed to sterilize wild horses through ovariectomy via colpotomy in other western states, including Idaho and Utah, which have required AWHC to divert resources away from its other missions and utilize those resources to again conduct extensive outreach to the public and to elected officials, as well as engaging the

agency through the submission of detailed comments. Because AWHC is a non-profit organization with extremely limited resources, diverting resources to opposing BLM's repeated decisions and proposals to sterilize wild horses using ovariectomy via colpotomy comes at the expense of AWHC's other priorities. Likewise, BLM's current decision harms AWHC's organizational interests by forcing it to divert resources away from AWHC's other activities in support of its mission, thereby impairing its ability to effectively promote and achieve its core organizational mission.

15. A court order vacating BLM's decision and remanding this issue to the agency for further proceedings consistent with federal law will protect AWHC's interests and those of its supporters in the welfare and preservation of wild horses, and will allow AWHC to devote its limited resources to other wild horse preservation and protection programs.

16. Plaintiff Robert Hammer is a professional data analyst and an avid outdoorsman and wildlife photographer with an impassioned ambition to visit every designated wild horse herd management area in Utah and photograph the wild horses that roam these locations. Mr. Hammer has traveled to numerous HMAs and Herd Areas in Utah and documented his travels in photographs and narratives that he makes freely available to the public in order to encourage and enable others to visit these often-remote areas and witness and appreciate wild horses. Mr. Hammer is also the author of a book on wild horses in Utah, *Salt Desert Mustangs: Discovering Wild Horses and Historic Trails in Tooele County, Utah*. Mr. Hammer makes his photographs and narratives about his travels publicly available on his website, [www.wildhorsetourist.com](http://www.wildhorsetourist.com), where he provides guidance about how to safely travel and navigate rugged terrain and how to safely and humanely observe wild horses. Mr. Hammer has also been featured in news articles

regarding wild horses and their management by BLM, and has submitted commentary in the Salt Lake Tribune criticizing a legislative effort to allow the slaughter of wild horses.

17. Mr. Hammer has visited the Confusion HMA at least six times since 2014 and has photographed wild horses that reside there. During his visits, Mr. Hammer explored nearly every road and navigable trail within this area. Mr. Hammer was also able to locate several wild horses in this HMA, and photos of these wild horses are available on Mr. Hammer's website. *See* <http://www.wildhorsetourist.com/confusion-mountains>. That website also provides detailed instructions for traveling to this HMA and wild horse viewing locations within the HMA. Likewise, Mr. Hammer's website provides detailed instructions for a 32-mile tour of the interior of the Confusion HMA for those with high-clearance, four-wheel-drive vehicles. *Id.* Mr. Hammer has also included the Confusion HMA within a "House Range Loop" day trip tour, the instructions for which are also freely available online. <http://www.wildhorsetourist.com/house-range-loop>.

18. Mr. Hammer has concrete plans to return to the Confusion HMA and continue his efforts to photograph the wild horses that reside there and to provide up-to-date instructions to the public for their visits to this area as well. The Confusion HMA is located in a complex of public lands in Millard County, Utah, that also includes neighboring HMAs, such as the Conger HMA. This complex of public lands is one of Mr. Hammer's favorite places on earth, and although he loves the terrain and landscape, the area's primary draw for Mr. Hammer is wild horses. Mr. Hammer visited the Confusion HMA in December 2020 and intends to return to this area in Millard County—including the Confusion HMA—as often as possible, at least once a year and hopefully twice a year.

19. When Mr. Hammer visits HMAs, including the Confusion HMA, one of his principal aesthetic and recreational interests is in observing and photographing wild horses engaged in their natural wild behaviors. Mr. Hammer has traveled to some HMAs where more frequent exposure to humans has rendered the wild horses there tamer and more docile. Mr. Hammer prefers to travel to more remote and less frequented locations, such as the Confusion HMA, where wild horses retain their full suite of natural behaviors. Although it can be more challenging to locate and photograph wild horses in these more remote locations, Mr. Hammer finds great reward in the experience of these animals' authentic, wild behavior. The wild behaviors that Mr. Hammer enjoys witnessing include mares rearing foals, as well as stallions engaged in their natural competitive behaviors. Mr. Hammer particularly cherishes an experience he had in Millard County, in the vicinity of the Confusion HMA, in which he had the opportunity to see a newly born foal.

20. BLM's decision to remove numerous wild horses from the Confusion HMA and to sterilize a significant portion of the wild horses that the agency will allow to remain on these public lands harms Mr. Hammer's aesthetic and recreational interests in continuing to observe and photograph these wild horses engaging in their natural, free-roaming behaviors. BLM's decision to remove over 500 wild horses from this area, and to leave only 70 to 115 wild horses within the HMA, will make it far more difficult to locate and photograph wild horses in this over 350 square mile area. Moreover, the permanent sterilization of a significant portion of the mares in the herd will make it far more difficult to observe or photograph mares engaging in natural behaviors such as rearing or interacting with foals. Although Mr. Hammer would like to return to the Confusion HMA to observe and photograph the wild horses that remain there, BLM's management actions may so severely impair Mr. Hammer's aesthetic and recreational interests in

the observation and documentation of wild horses that he may no longer be able to enjoy traveling in this area. Likewise, by making it significantly more difficult to locate wild horses in this HMA, or to observe wild horses engaging in natural behaviors, BLM's management actions will likely discourage other members of the public from visiting this HMA, which will harm Mr. Hammer's established interest in encouraging members of the public to safely visit this area and appreciate the federally protected wild horses that reside there.

21. BLM's decision to surgically sterilize mares through ovariectomy via colpotomy, and to impose serious limitations on the public's ability to observe its treatment of these sterilized horses, also harms Mr. Hammer's interests. As described below, ovariectomy via colpotomy risks serious behavioral impacts on individual mares and on the behavior of herds, including the elimination of mares' ability to have foals and the risk that ovariectomized mares may either enter a permanent state of estrus or may stop entering estrus permanently, either of which would disrupt normal reproductive cycles and behaviors. As such, the release of mares sterilized through ovariectomy via colpotomy into the Confusion HMA will adversely impact Mr. Hammer's ability to observe wild horses engaged in their natural behaviors in this area, such as the rearing of foals or the normal suite of reproductive behaviors in a wild horse herd. Likewise, BLM's restrictions on observation of its treatment of sterilized mares impairs Mr. Hammer's interest in promoting unbiased public understanding of BLM's management of federally protected wild horses. As described above, Mr. Hammer makes his photographs and travel guides freely available to the public in an effort to promote the public to visit public lands and have their own, unbiased experience of the reality of wild horses' day-to-day existence on America's public lands. Mr. Hammer encourages members of the public to visit these areas themselves not only because he believes that people will find such voyages aesthetically,

recreationally, and spiritually enriching, but also because he worries that BLM itself is not always a reliable, unbiased source of information regarding wild horses or the tools that BLM uses to manage their populations. For example, Mr. Hammer's experience as a professional data analyst has enabled him to discern deficiencies in BLM's discussions of reasons for its management actions, such as deficient discussions of wild horse populations that, as a professional data analyst, Mr. Hammer believes are sloppy at best and may, at worst, represent a manipulation or cherry-picking of data to support the agency's preferred actions. Mr. Hammer thus encourages the public to engage in direct observation of wild horses on public lands so that the public can have an unbiased view of the reality of wild horses' day-to-day existence that is not filtered through BLM's self-serving accounts of its own management actions. Mr. Hammer is concerned that without any independent observation of the agency's use of ovariectomy via colpotomy, the public will have no ability to obtain an authentic and unbiased account of the agency's treatment of these federally protected animals, which thwarts Mr. Hammer's interest in fostering a genuine, unbiased public understanding of the management of wild horses.

22. A court order vacating BLM's decision and remanding this issue to the agency for further proceedings consistent with federal law will protect Mr. Hammer's interests in the welfare and preservation of wild horses.

23. Defendant David Bernhardt is the Secretary of the United States Department of the Interior, the parent agency of BLM and, accordingly, is ultimately responsible for the decision challenged here.

24. Defendant William Perry Pendley is the de facto Acting Director of BLM. In 2020, the United States District Court for the District of Montana held that Mr. Pendley has been unlawfully serving as the agency's acting Director. *See Bullock v. U.S. Bureau of Land Mgmt.*,

No. 4:20-cv-00062-BMM, ECF No. 25 (D. Mont. Sept. 25, 2020). In response, Mr. Pendley changed his job title, but not his duties. Nominally, Mr. Pendley is now BLM’s “Deputy Director, Policy and Programs.” However, Mr. Pendley in fact continues to serve—unlawfully—as BLM’s Acting Director. As the de facto Acting Director of BLM, Mr. Pendley is responsible for the decision at issue.

## **FACTS GIVING RISE TO PLAINTIFFS’ COMPLAINT**

### **I. STATUTORY AND REGULATORY FRAMEWORK**

#### **A. The Federal Land Policy and Management Act**

25. The Federal Land Policy Management Act of 1976 (“FLPMA”), 43 U.S.C. §§ 1701-1787, is administered by BLM. It requires that certain public lands and their resources be “periodically and systematically inventoried and their present and future use [] projected through a land use planning process.” *Id.* § 1701(a)(2). FLPMA further mandates that “public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.” *Id.* § 1701(a)(8).

26. FLPMA requires BLM to “develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas the use of the public lands.” 43 U.S.C. § 1712(a). BLM does so through developing, maintaining, and revising “Resource Management Plans” (“RMPs”)—written documents “designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses.” 43 C.F.R. § 1601.0-2. Once BLM has issued an RMP governing a particular area of public lands,

“[a]ll future resource management authorizations and actions . . . and subsequent more detailed or specific planning, shall conform to the approved [RMP].” *Id.* § 1610.5-3(a). Any proposed action that “is not in conformance” with the RMP can only be implemented “through a plan amendment.” *Id.* § 1610.5-3(c).

**B. The Wild Free-Roaming Horses and Burros Act**

27. Finding that “wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West,” and that “they contribute to the diversity of life forms within the Nation and enrich the lives of the American people,” Congress enacted the Wild Horse Act (“WHA” or “the Act”) in 1971 to ensure that “wild free-roaming horses and burros shall be protected from capture, branding, harassment, [and] death,” and that they are “considered in the area where presently found, as an integral part of the natural system of the public lands.” 16 U.S.C. § 1331.

28. The Act provides that the Secretary of the Interior “shall manage wild free-roaming horses and burros as components of the public lands . . . in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands.” *Id.* In delineating areas for wild horse use, the BLM “shall consider the appropriate management level for the herd, the habitat needs of the animals, [and] the relationships with other uses of the public and adjacent private lands.” 43 C.F.R. § 4710.3-1. The appropriate management level (“AML”) is “expressed as a population range within which [wild horses] can be managed for the long term.” *See* BLM Handbook H-4700-1, at 4.2.1; 16 U.S.C. § 1331(b)(1) (authorizing BLM to determine AMLs).



29. The WHA establishes rigorous procedures that BLM must follow in managing wild horse populations, and states that “[a]ll management activities shall be at the minimum feasible level,” 16 U.S.C. § 1333(a).

30. BLM manages wild horses on public lands in Herd Management Areas (“HMA”). 43 C.F.R. § 4710.3-1. BLM “shall prepare a herd management area plan” (“HMAP”) to govern management of wild horses in a particular HMA, although a single HMAP “may cover one or more herd management areas.” *Id.* In a recent report to Congress, BLM stated that “HMAP development is a key component in the decision-making process for BLM’s wild horse and burro management activities on the ground.”

31. By establishing a procedure for BLM to manage “overpopulations” of wild horses, the WHA includes a default assumption that wild horses will be fertile and will reproduce. *See* 16 U.S.C. § 1331(b). If BLM, on the basis of the AML and other factors, determines that (a) there is an “excess” of wild horses in a given area of public lands, and (b) those horses must be removed, the agency may take measures to remove “excess” animals in order “to restore a thriving natural ecological balance to the range.” *Id.* The statute defines the term “excess” to mean those “wild free-roaming horses or burros . . . which must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area.” *Id.* at § 1332(f). As when it adjusts AML, in making an “excess” determination, BLM “shall analyze grazing utilization and distribution, trend in range ecological condition, actual use, climate (weather) data, current population inventory . . . and other factors such as the results of land health assessments which demonstrate removal is needed to restore or maintain the range in a” thriving natural ecological balance. BLM Handbook H-4700-1, at 4.3.

32. The WHA further requires BLM to consider expert input and oversight in its management of wild horses. For example, the WHA required the creation of a “joint advisory board . . . to advise [the BLM and Forest Service] on any matter relating to wild free-roaming horses and burros and their management and protection.” 16 U.S.C. § 1337. Similarly, BLM must “consider the recommendations of qualified scientists in the field of biology and ecology . . . [which] may include members of the Advisory Board” in its efforts to “achieve and maintain a thriving natural ecological balance on the public lands.” *Id.* § 1333(a). When “determin[ing] whether appropriate management levels should be achieved by the removal or destruction of excess animals, or other options (such as sterilization, or natural controls on population levels . . . [BLM] shall consult with” state and federal wildlife management agencies and “such individuals independent of Federal and State government as have been recommended by the National Academy of Sciences, and such other individuals whom [it] determines have scientific expertise and special knowledge of wild horse and burro protection . . . .” *Id.* § 1333(b)(1).

33. The WHA embodies Congress’ intent that wild horses be treated humanely. For example, in any roundup of wild horses, BLM must ensure that horses are “humanely captured and removed” from the range. *Id.* § 1333(b)(2)(iv)(B). In order to allow adoption of wild horses, the BLM must “assure humane treatment and care” and may allow an individual to adopt more than four wild horses only if it “determines in writing that such individual is capable of humanely caring for” them. *Id.* And, although the WHA originally allowed BLM to “destroy” wild horses “in the most humane manner possible,” *id.* §§ 1333(b)(2)(iv)(A), (C), Congress has since outlawed this practice by forbidding appropriated funds to be spent on the destruction of healthy, unadopted wild horses. Further highlighting Congressional concern for the humane treatment of wild horses, one of the WHA’s original sponsors described the law as an act of “a

humane and concerned Government, concerned with protecting our Nation’s wildlife and our national heritage.” Fifty years later, sixty-five members of Congress reiterated this view in specific opposition to efforts to sterilize wild horses, sending a letter to the Secretary of the Interior on July 28, 2011 in opposition to “the drastic, inhumane practice of spaying and gelding wild horses.” Similarly, in 2019 and 2020 lawmakers in both the House and Senate again expressly criticized BLM for pursuing the ovariectomy via colpotomy method, noting that the agency appears to recognize “the risky nature of the procedure, but is nevertheless aiming to quantify precisely how dangerous it is using federally protected animals”, and that the BLM should instead “pursue humane and scientifically-supported fertility control projects, such as the [PZP] vaccine.” To that end, the Senate Appropriations Committee approved language in the Fiscal Year 2020 Interior report specifically delineating that “any population growth suppression strategies” employed by the BLM “must be proven, safe, and humane” (S. Rept. 116-123). Spaying mares, particularly through ovariectomy via colpotomy, fails to meet that bar, as documented in a letter sent by numerous members of Congress to BLM objecting to the agency’s decision to utilize this method of sterilization in the Confusion HMA. Further, the House passed an amendment to its Fiscal Year 2021 Appropriations Bill which expressly directs the BLM to spend a significant portion of allocated funds on scientifically proven, humane PZP fertility control vaccines but does not earmark funds for other forms of fertility control.

**C. The National Environmental Policy Act**

34. Congress enacted NEPA to ensure that federal agencies fully consider the environmental impacts of their actions before taking them, consider alternatives to proposed actions that may have less adverse environmental impacts, and make information publicly available with sufficient detail to promote fully informed public participation in agency decision-making.

35. To meet these objectives, all agencies must prepare an Environmental Impact Statement (“EIS”) for any major federal action that may “significantly affect[]” the environment. 42 U.S.C. § 4332(C).

36. The Council on Environmental Quality (“CEQ”)—an agency within the Executive Office of the President—has promulgated regulations implementing NEPA that are “binding on all Federal agencies.” 40 C.F.R. § 1500.3. These regulations provide that in determining whether an EIS is required with respect to a particular proposed action, an agency must prepare an Environmental Assessment (“EA”) that analyzes the environmental impacts of the proposed action as well as alternatives. *Id.* §§ 1501.4(c), 1509.9.<sup>1</sup>

37. In determining whether an EIS is required, the agency must consider whether the proposed action may have a “significant” effect on the human environment. 40 C.F.R. § 1508.27. The “significance” determination is based on factors such as the degree to which the effects on the environment “are likely to be highly controversial” or “are highly uncertain”; the degree to which the action “may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration,” or “may cause loss or destruction of significant scientific, cultural, or historical resources”; and whether the action “threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.” *Id.*

38. A significant effect, requiring an EIS, may exist “even if the Federal agency believes that on balance the effect will be beneficial.” 40 C.F.R. § 1508.27(b)(1).

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<sup>1</sup> CEQ amended its regulations in 2020. *See* 85 Fed. Reg. 43,304 (July 16, 2020). However, because the decision at issue was made under the previous version of CEQ’s regulations, the new regulations do not apply to this case.

39. The existence of any one of the CEQ significance criteria usually requires the preparation of an EIS.

40. If an agency decides that an EIS is not required, it issues a Finding of No Significant Impact (“FONSI”), which must present the reasons why the agency has determined its proposed action “will not have a significant impact” on the environment.” 40 C.F.R. § 1508.13.

41. NEPA requires agencies to consider a range of reasonable alternatives to its proposed action. *See* 40 C.F.R. § 1502.14. An agency may not artificially constrain its analysis of reasonable alternatives by framing its purpose and need statement for a proposed action in an excessively narrow manner.

## **II. FACTUAL BACKGROUND**

### **A. The Confusion Herd Management Area**

42. The Confusion HMA comprises roughly 235,000 acres of public and private land in western Utah. Wild horses have lived in the Confusion HMA and maintained a viable population there since before Congress enacted the WHA in 1971.

43. The Confusion HMA is located in the House Range Resource Area. In 1987, BLM promulgated the House Range Resource Area Resource Management Plan (“1987 RMP”) to govern management actions throughout this area. The 1987 RMP established an AML for wild horses in the Confusion HMA of 70 to 115 individuals. To sustain this small population, BLM allocated the wild horses in the Confusion HMA 1,644 Animal Unit Months (“AUM”) of forage.

44. BLM also allows livestock to graze over the entirety of the Confusion HMA, dividing the HMA into five grazing allotments, which are used by eleven livestock operators. The agency has permitted vastly more livestock to graze in the HMA than the small number of

wild horses that the agency claims is the most the land can sustain: BLM limits wild horses to no more than 115 wild horses in this area, but permits grazing by more than 2,500 cattle and more than 7,500 sheep. To sustain these vastly larger populations of livestock, the agency authorizes livestock operators to use 25,312 AUMs each year—more than fifteen times the amount of forage allocated to wild horses. And although the agency has reduced the allocation of forage due to drought and other changed conditions, the agency most recently allocated 12,289 AUMs for livestock in one allotment alone—still more than seven times the forage allocated to wild horses.

45. The 1987 House Range RMP does not authorize, or even contemplate, the sterilization of wild horses. For example, the RMP does not use the word “sterilization” and does not propose any actions that would involve sterilizing horses. Instead, the RMP states that “[w]ild horses will continue to be managed in accordance with provisions of the Wild Horse and Burro Act of 1971 and subsequent legislation and regulations.” Likewise, the RMP does not propose any implementing actions that include sterilization of wild horses. Instead, the RMP contains the following “Planned Actions”: (1) “Continue established HMAs”; (2) maintaining wild horses within an AML of 70 to 115 individuals; (3) allocating forage to support the wild horses at AML; (4) conducting monitoring studies to “more precisely determine” the herd’s accurate population, age and sex ratio, social structure, and general physical conformation and condition; (5) remove wild horses from a particular allotment; and (6) conduct “[w]eekend surveillance patrols” to reduce harassment of wild horses during the spring foaling season. Accordingly, none of the RMP’s objectives or planned actions for wild horses in the Confusion HMA include the use of permanent sterilization.

46. The 1987 House Range RMP specifies that “Herd Management Plans will be completed to provide detailed guidance for management of individual HMAs.” However, since 1987, BLM has never completed any HMAP to “provide detailed guidance” for management of the Confusion HMA.

47. Since 1987, consistent with the RMP’s management focus on wild horse removals as the exclusive management tool for achieving and maintaining AML, BLM has periodically rounded up and removed wild horses from the Confusion HMA that the agency has determined to be “excess.” BLM conducted its most recent roundup in 2010, at which time the agency removed 162 wild horses and left roughly 157 horses in the HMA. On information and belief, BLM has never previously managed the population of wild horses in the Confusion HMA using any form of permanent sterilization.

**B. BLM’s Nationwide Effort To Permanently Sterilize Wild Horses**

48. Since Congress enacted the WHA in 1971, BLM’s principal tool for managing wild horse populations throughout the nation has been removing horses from the range when the agency deems the horses “excess.” In the decades since the WHA’s enactment, BLM has removed tens of thousands of wild horses from public lands across the west. The agency typically makes wild horses removed from the range available for public adoption and sends unadopted horses to live out their lives in permanent holding facilities.

49. In addition to removals, BLM has previously spent less than 1% of its annual budget for the Wild Horse and Burro Program on temporary, reversible forms of contraceptives as an aspect of its management of wild horse populations. Between 2012 and 2018, for example, BLM administered such forms of fertility control to roughly 4,000 wild horses. Critically, these

fertility-control vaccines are temporary and reversible; they do not result in the permanent sterilization of wild horses.

50. In the last ten years, however, BLM has attempted to radically alter its historic approach to managing wild horse populations by permanently sterilizing wild horses. Many such agency efforts to permanently sterilize wild horses on the public range failed in the face of expert scientific evidence and fervent public opposition. For example, in 2011, AWHC opposed BLM's first plan to geld wild stallions and spay mares on the public range in Wyoming. AWHC submitted to BLM declarations from undisputed experts in wild horse fertility control explaining that gelding would cause dire adverse effects on the behavior of wild horses, but BLM did not consider this information. After AWHC filed suit to challenge BLM's failure to consider this expert scientific information, the agency withdrew that decision. *See Am. Wild Horse Pres. Campaign v. Salazar*, 800 F. Supp. 2d 270, 271 (D.D.C. 2011) (finding moot a challenge to BLM's withdrawn decision). Likewise, in 2012, AWHC challenged BLM's refusal to consider this same scientific information when deciding to permanently sterilize wild horses through gelding in Nevada. *Am. Wild Horse Pres. Campaign v. Salazar*, 859 F. Supp. 2d 33, 47 (D.D.C. 2012). BLM has since released geldings to the range in order to study the behavioral impacts of gelding in an HMA in Utah, and has decided to release geldings (but on information and belief has not actually done so) in an HMA in Nevada.

51. In 2017, BLM decided to permanently sterilize an entire herd of wild horses in Idaho, but the U.S. District Court for the District of Idaho vacated the agency's decision after finding that the agency had acted arbitrarily and capriciously by failing to consider highly relevant scientific information that the agency itself commissioned from the National Academy



of Sciences. *See Am. Wild Horse Pres. Campaign v. Zinke*, No. 1:16-cv-1, 2017 WL 4349012 (D. Idaho Sept. 29, 2017).

52. BLM has never before surgically sterilized wild mares as part of its wild horse population management efforts in any HMA throughout the nation. However, BLM has previously announced—and abandoned—plans to study the permanent sterilization of wild mares through ovariectomy via colpotomy. In 2016, BLM decided to fund experiments on three forms of permanent, surgical sterilization of wild mares in Oregon, including experiments on ovariectomy via colpotomy, as well as two less-invasive forms of sterilization. These experiments aimed to quantify, among other issues, how often ovariectomy via colpotomy kills mares or causes them to abort unborn foals.

53. Ovariectomy via colpotomy is a highly invasive surgical technique disfavored by many veterinary experts because of the high risk of death and injury to both the mare and its foal if the mare is pregnant, which is usually the case with respect to wild horses removed from the range. The procedure involves reaching into a mare’s abdominal cavity through an incision in the vaginal wall, blindly and without any tool to visualize the mare’s organs, to identify the ovaries by touch and to remove them by severing them with a loop of chain. The blind nature of this procedure distinguishes it from a similar, but significantly less invasive, “keyhole” procedure that veterinarians perform on domestic mares using a laparoscope that allows them to visually observe what they are doing.

54. In its 2016 decision to conduct experiments on ovariectomy via colpotomy, which the agency withdrew rather than allow for any meaningful, independent observation, BLM repeatedly stated that one of its goals was to assess the “social acceptability” of its treatment of wild horses. One of the chief goals that BLM stated in its EA for its 2016 sterilization research

was to “determine the social acceptability” of three types of sterilization in order to inform BLM’s future decisions regarding the management of wild horses on the public range—i.e. whether the public will accept such operations. As BLM’s 2016 EA stated, “[t]he ultimate question in the reasonably foreseeable future of wild horse population management” includes “determin[ing] which methods are safe, effective, and socially acceptable.” BLM further acknowledged in the 2016 EA that this research was in fact intended to inform the agency’s management actions on the public range, stating that “[u]nderstanding each procedure’s immediate effects and evaluating their pros and cons is the first step to ultimately making decisions on what techniques to use on the range in the future.” The 2016 EA also made clear that this study was directly aimed at assessing the social acceptability of these procedures: “The results of this study [we]re expected to aid BLM in determining the social acceptability of each procedure.”

55. To ensure that the public could witness an unbiased account of the agency’s treatment of and post-surgical care for these mares, AWHC and a group of other advocates sought access to observe and record the agency’s experiments, but the agency denied any access for observation. Consequently, AWHC and its coalition filed a lawsuit challenging BLM’s decision to conduct these experiments without any public observation or oversight as a violation of the plaintiffs’ First Amendment rights to observe the agency’s treatment of these federally protected animals. After AWHC filed a motion for a preliminary injunction, BLM cancelled the experiments. *See Kathrens v. Zinke*, No. 2:16-cv-01650 (D. Or. 2016).

56. In 2018, BLM announced another decision to conduct experiments on ovariectomy via colpotomy in Oregon. In its 2018 decision, BLM abandoned any effort to experiment on less-invasive forms of surgical sterilization and focused solely on ovariectomy via

colpotomy. As a purported justification for its narrowed focus, BLM explained that the U.S. Fish and Wildlife Service (“FWS”) had utilized ovariectomy via colpotomy to sterilize wild mares in a National Wildlife Refuge in Nevada, although BLM recognized that FWS had not conducted any genuine scientific study and had not attempted to study the behavioral impacts from ovariectomy via colpotomy. As such, BLM again decided it was necessary to conduct experiments to determine how often ovariectomy via colpotomy kills wild horses or causes them to abort their unborn foals, and what impacts the surgical removal of mares’ ovaries may have on the behavior of individuals and of the herd in which they would live.

57. As they had done in 2016, AWHC and a coalition of other advocates sought access to observe and record the agency’s experiments, to provide the public with an unbiased account of the agency’s treatment of wild horses. Although BLM provided some limited public access, AWHC and its coalition explained that the access the agency provided failed to provide any meaningful opportunity for observation. As such, AWHC and its coalition again filed a lawsuit challenging the agency’s restrictions on public observation as a violation of the plaintiffs’ First Amendment rights. AWHC also challenged BLM’s failure in 2018 to consider the “social acceptability” of ovariectomy via colpotomy as an unexplained reversal of its previous emphasis on the need to evaluate this issue in substantially similar experiments only two years previously. The U.S. District Court for the District of Oregon issued a preliminary injunction against BLM’s 2018 experiments, finding that the plaintiffs were likely to prevail on their First Amendment claim regarding the need for greater public observation, as well as on their claim that the agency had arbitrarily and capriciously jettisoned its prior emphasis on evaluating the “social acceptability” of its treatment of wild horses in the agency’s experiments.

*See Kathrens v. Bernhardt*, No. 3:18-cv-01691, ECF No. 24 (D. Or. 2018). BLM then withdrew its decision to conduct these experiments.

58. While AWHC's 2018 challenge to BLM's experiments on ovariectomy via colpotomy was still pending, BLM proposed a third, substantially similar set of experiments in the same location. AWHC filed comments on the agency's draft EA for this third proposed round of experiments, explaining that the agency was obligated to comply with the First Amendment by providing a meaningful opportunity for public observation, and that the agency was obligated to assess the "social acceptability" of its experimental procedures. Rather than issue any final decision—or any response to AWHC's comments—BLM submitted a sworn declaration explaining that the agency would not finalize its most recent proposed experiments and instead "would have to conduct new environmental analysis pursuant to [NEPA] prior to finalizing a decision record authorizing a spay study." *See Kathrens v. Bernhardt*, No. 3:18-cv-01691, ECF No. 57-1.

59. Accordingly, although BLM has twice issued, then abandoned, formal decisions to conduct experiments on the use of ovariectomy via colpotomy to sterilize wild horses, and has issued and abandoned a third proposal to do the same, the agency has never before actually sterilized wild mares using this procedure. Likewise, although BLM has previously proposed to study how ovariectomy via colpotomy affects the behavior of sterilized wild mares and the herds in which they would reside, BLM has never actually conducted such a study. Nor, on information and belief, has any other federal agency or scientific institution ever conducted any scientific study on the behavioral impacts from ovariectomy via colpotomy to individual wild horses or wild horse herds. Likewise, BLM has never previously employed ovariectomy via colpotomy as a management tool.

60. In 2019, BLM circulated nationwide a Request for Information (“2019 RFI”) in an attempt to identify veterinarians who would be willing to sterilize wild mares. The 2019 RFI asked veterinarians to identify what procedure they would use, along with other information about such procedures, such as complication rates. BLM’s 2019 RFI also specifically noted that “[i]t may be required that mare sterilization procedures be done in a way that allows for public observation, potentially including videography,” and asked whether respondents would “still be willing to perform the procedure.” Agency documents regarding the 2019 RFI, which AWHC obtained through a request under the Freedom of Information Act, indicated that there are “about 5000” veterinarians in the United States who work on horses, yet *only five veterinarians responded* to BLM’s RFI. Of the five veterinarians who responded to BLM’s 2019 RFI, *none* proposed sterilizing wild mares through ovariectomy via colpotomy—again demonstrating that this procedure is widely regarded as inhumane and cannot be considered socially acceptable. Notably, the procedures that veterinarians proposed in response to BLM’s 2019 RFI were all more humane than ovariectomy via colpotomy, for example because they proposed to utilize tools and modern methods to visualize a mare’s organs during surgery rather than groping blindly inside the animal, or because they proposed non-surgical methods for sterilization with fewer adverse physiological or behavioral repercussions. Additionally, responding veterinarians indicated that they *would* be willing to allow observation or recording of the sterilization procedures. For example, one respondent to the RFI who proposed a non-surgical sterilization method confirmed that “we would welcome allowing observation, photos, and/or videography by the public during the procedures” because “[i]t would be to an advantage to allow the public to confirm a humane method for reducing overpopulation of wild horse herds while maintaining social behavior and herd integrity.”

61. As described above, BLM's attempt to fundamentally alter its historic practice of managing reproducing, self-sustaining wild horse populations principally through removals by instead permanently sterilizing wild horses has been a nationwide effort that has not been limited to any particular HMA, or even any single state. To the contrary, BLM has proposed permanent sterilization of wild horses in Wyoming, Idaho, Oregon, Nevada, and Utah.

**C. BLM's Decision to Round Up and Sterilize Horses in the Confusion HMA**

62. BLM's Confusion HMA Wild Horse Gather Plan reflects the agency's decision to manage the population of wild horses within this HMA over the next ten years through a combination of removing horses determined to be "excess" in order to reduce the population to within the AML designated in the 1987 House Range RMP, and performing ovariectomies via colpotomy to surgically sterilize mares that will remain on the range in order to reduce the population's growth rate.

***1. BLM's Draft EA and Public Comments***

63. BLM issued a draft EA for the Confusion HMA Wild Horse Gather Plan in June 2020. The draft EA considered five extremely broad alternatives for the next decade of wild horse population management within this HMA: (1) rounding up and removing wild horses to achieve low AML with sex-ratio adjustments; (2) removing wild horses to achieve low AML with no population growth suppression measures; (3) removing wild horses to achieve low AML and using fertility control vaccines or intra-uterine devices to slow population growth; (4) rounding up wild horses to achieve low AML and sterilizing mares to slow population growth; and (5) taking no action. Although BLM's draft EA identified "establishing a non-reproducing component" of the herd in this HMA as the agency's proposed action, the draft EA did not identify ovariectomy via colpotomy as the agency's preferred means for doing so. Instead, BLM

stated that “one or more of the sterilization procedures discussed” in the EA’s appendices “would be conducted.”

64. BLM accepted public comments on its draft EA until July 27, 2020. As BLM recognized in its final EA, “[m]ost of the comments were opposed to gather and removal of wild horses and proposed the implementation of some form of PZP use to control population growth.”

65. AWHC submitted extensive comments on BLM’s draft EA, explaining that the agency should not choose to surgically sterilize wild horses in the Confusion HMA and specifically should not choose to do so through ovariectomy via colpotomy. For example, AWHC’s comments stressed that “the American public and many scientists and equine veterinarians have repeatedly voiced significant criticisms (including on the physiological and behavioral impacts) regarding the use of ovariectomy by colpotomy each time that BLM has proposed implementing the procedure in the past.” AWHC’s comments also cited specific criticisms of ovariectomy via colpotomy, including criticism in a report by the National Academy of Sciences (“NAS Report”) that BLM itself commissioned, which found that ovariectomy via colpotomy is “inadvisable.” Likewise, AWHC’s comments cited input from experienced researchers and equine veterinarians explaining that ovariectomy via colpotomy will have severe adverse impacts on individual wild horses and wild horse herds. For example, one such veterinarian explained that “ovariectomized mares frequently act like they are in heat all the time,” and that for this reason ovariectomized mares are often used as “teaser” horses to stimulate stallions in domestic settings because of their constant estrus. These comments, including input from an experienced veterinarian, further warned BLM that “[p]utting ovariectomized mares back on the range could create social havoc within herds” due to the disruption of the animals’ normal reproductive cycles. Accordingly, AWHC advised BLM that

of all of the options considered in the draft EA, ovariectomy via colpotomy was the least appropriate for use in managing wild horse populations due to its inhumane nature and its adverse impacts on individual horses and wild horse herds.

66. AWHC's comments also stressed that the agency's draft EA lacked any sufficient analytical basis that would enable the agency to rationally select ovariectomy via colpotomy as a management tool in the Confusion HMA. For example, AWHC's comments explained that the draft EA failed to take a hard look at scientific and expert veterinary input concerning the individual physiological and behavioral impacts of ovariectomy via colpotomy, as well as the consequent impacts on wild horse herds. Likewise, AWHC's comments explained that the agency could not rationally choose to implement ovariectomy via colpotomy as a management tool without providing a rational explanation for its departure from its previous approach of first studying the procedure's physiological and behavioral impacts through scientific experiments.

67. AWHC's comments also stressed that BLM's draft EA ignored a critical issue regarding ovariectomy via colpotomy—namely, whether it is “socially acceptable.” As AWHC's comments explained, BLM correctly identified this as a crucial issue when it first decided to conduct experiments on ovariectomy via colpotomy in Oregon in 2016. AWHC also explained that when BLM decided to conduct similar experiments in Oregon in 2018, but failed to include any inquiry into social acceptability in those experiments, the U.S. District Court for the District of Oregon issued a preliminary injunction, specifically finding that plaintiffs were likely to succeed in establishing that the agency acted arbitrarily and capriciously by failing to explain why it jettisoned any analysis of social acceptability. Further, AWHC's comments explained that an inquiry into social acceptability is wholly consistent with the WHA itself, which Congress enacted “precisely because of the social and cultural importance of wild horses.” *See* 16 U.S.C. §



1331 (“Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West” and “that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people”).

68. AWHC’s comments also explained that each time BLM has commissioned a report from the NAS on the agency’s management of wild horses, the NAS has reaffirmed the critical importance of considering the social acceptability of the agency’s methods for managing wild horse populations, and that the NAS has provided explicit methodological guidance as to the appropriate way for the agency to take this key issue into consideration. BLM commissioned the NAS to assess, among other issues, “options available to BLM to address the widely divergent and conflicting perspectives about wild horse and burro management and to consider stakeholder concerns while using the best available science to protect land and animal health.” In response, the NAS Report in 2013 devoted an entire chapter to “Social Considerations in Managing Free-Ranging Horses and Burros.” The NAS Report reaffirmed a 1982 finding that “public opinion was the major motivation behind the wild horse and burro protection program and a primary criterion of management success” and explained that BLM “should be carefully attentive” to such issues. To assist BLM in doing so, the NAS reviewed four methodologies for assessing and considering public input and identified a method called “analytic deliberation” as the most appropriate for use by BLM. The NAS Report described this methodology and its advantages, specifically noting that this methodology “could help to clarify issues of public concern while informing the public about the issues that BLM faces.” As directly relevant to BLM’s decision here, the NAS Report noted that the use of “analytic deliberation” and adaptive management could allow the agency to “figure out how to sterilize the right number of animals each year and in each location to achieve an unknown ideal free-ranging population while

minimizing the number of animals gathered and put into holding facilities.” The NAS Report explicitly “conclude[d] that the analytic-deliberative approach is the most appropriate for use in the Wild Horse and Burro Program,” and found that this methodology could “improve the quality of agency decisions.” AWHC’s comments specifically identified all of these findings by the NAS and advised the agency that it must, at a bare minimum, consider the findings from the NAS Report that the agency itself commissioned. Likewise, AWHC’s comments explicitly advised the agency that if it wished to proceed with ovariectomies via colpotomy, the agency must either conduct an inquiry into the social acceptability of this procedure or at the very least explain why it was abandoning this important inquiry.

69. AWHC’s comments also explained that if BLM intended to conduct ovariectomies via colpotomy, it would be essential for the agency to provide a meaningful opportunity for observation, so that the public can receive an unbiased accounting of the agency’s treatment of wild horses. AWHC specifically criticized BLM’s decision to conduct surgeries in an undisclosed private facility and to rely on a private veterinarian—serving as a government contractor—to make the determination as to what level of public observation would be permitted. As AWHC’s comments explained, that decision appears “tailor-made to impede outside and independent observation given that the BLM is unambiguously seeking to carry out surgical sterilizations away from public view.” AWHC’s comments also advised BLM that if the agency decided to implement ovariectomies via colpotomy, AWHC would be “prepared to offer names of unaffiliated veterinarians to potentially serve as observers,” as AWHC had previously done when BLM decided to conduct experiments on this procedure in Oregon in 2016 and 2018. Likewise, AWHC’s comments included as an attachment comments previously filed on BLM’s 2016 and 2018 experiments in Oregon, which explained that the agency should allow for the

installation of small, unobtrusive cameras to record the surgeries, which would “help the public understand these experiments, evaluate whether ovariectomy via colpotomy is appropriate for use on wild horses, and would provide for 24-hour observation of horses in recovery, improving the odds of a humane outcome.”

70. AWHC’s comments also explained that before BLM could undertake the actions contemplated in the draft EA, the agency would have to first comply with the land-use planning requirements established in FLPMA. For example, AWHC’s comments advised BLM that because the actions the agency proposed were not in conformance with the 1987 House Range RMP, “an amendment to the 1987 RMP is appropriate here and the only way the BLM may lawfully accomplish the objectives identified in the Draft EA.” More specifically, AWHC’s comments explained that “[t]he new population control methods proposed by the BLM represent a change in the ‘terms, conditions and decisions’ of the 1987 RMP,” which can only be implemented through a formal RMP revision.

71. Likewise, AWHC’s comments also advised the agency that “to comply with FLPMA’s requirements” the agency would need to “produce a Herd Management Area Plan (‘HMAP’) before finally creating the narrow and site-specific plan that a roundup EA is meant to serve.” AWHC also stressed that “[b]oth the HMAP for the Confusion HMA and the new draft EA for roundup plan in the Confusion HMA must provide the public with a specific preferred action that the BLM has selected to implement, including, but not limited to, a detailed accounting for how the chosen population tool or tools will be implemented, how the agency would manage a herd as non-reproducing (or with a non-reproducing component) if at all, and with a thorough consideration of opposing viewpoints of each method to be implemented.” AWHC further explained that “[w]ithout this detailed evaluation in a programmatic planning

document, the BLM lacks authority to proceed with the problematic options put forth in the EA since FLPMA does not allow site-specific decisions to be inconsistent with the operative RMP.” As described above, the 1987 House Range RMP explicitly states that “Herd Management Plans *will be completed* to provide detailed guidance for management of individual HMAs.”

72. AWHC’s comments also explained that, even if BLM’s proposed action were in conformance with the guiding 1987 RMP (which it is not), the agency would nonetheless need to prepare an EIS before surgically sterilizing any mares through ovariectomy via colpotomy. As AWHC explained, this procedure is highly controversial within the meaning of NEPA, as demonstrated by input from numerous scientists and veterinarians creating a substantial dispute about the physiological and behavioral impacts from this procedure. Likewise, this procedure has highly uncertain impacts in the absence of any scientific study regarding its behavioral impacts to individual wild horses and wild horse herds. AWHC also explained that BLM’s choice of this controversial and uncertain procedure could establish a precedent for its use across the nation. Finally, AWHC also explained that the decision to perform ovariectomies via colpotomy also threatens a violation of the WHA in several respects, including because the agency disregarded evidence from the NAS that the statute explicitly requires it to consider.

## **2. BLM’s Final Decision**

73. On October 5, 2020, BLM issued its final Decision Record for the Confusion HMA Wild Horse Gather Plan, along with a Final EA, FONSI, and Comment Report describing the public comments the agency received and providing the agency’s responses. Although BLM’s Draft EA had not identified any particular form of sterilization as the agency’s proposed action, BLM’s final decision record “select[ed] ovariectomy via colpotomy as the method for spaying mares.”

74. BLM announced that it had selected ovariectomy via colpotomy based on information from one instance in which mares were sterilized through this procedure by FWS in the Sheldon National Wildlife Refuge in Nevada. BLM asserted that this single instance showed that “herd growth rates decreased in proportion to the fraction of mares in the herd that were spayed.” Likewise, BLM claimed that “behavioral observations” from that single instance “demonstrated that ovariectomized (spayed) mares were always observed with other feral horses,” ostensibly “indicat[ing] that spayed mares continued to have social relationships with other feral horses.”

75. However, BLM previously decided in 2018 that it was necessary to study the behavioral impacts from ovariectomy via colpotomy despite having access at that time to the same information from the Sheldon Refuge in Nevada. At that time, BLM decided that it was necessary to undertake its own study of behavioral impacts in part because in the Sheldon Refuge “[n]o data were collected on inter- or intra-band behavior (e.g. estrous display, increased tending by stallions, etc.).” Accordingly, in 2018, BLM stated that “[t]here is a need for more detailed quantification of surgical and behavioral effects of this method, using appropriate study design—including studying an adequate population—to effectively draw conclusions about the method’s effects.” Likewise, BLM stated in 2018 that “[f]urther study of this method is needed to provide BLM more detailed quantification of the feasibility of this procedure as it relates to morbidity and mortality rates.”

76. Nevertheless, in the Confusion HMA, BLM jettisoned its prior recognition that—even with the results from the Sheldon Refuge—further study of ovariectomy via colpotomy was necessary before it could be used as a population management tool. Instead, in an abrupt about-face, the agency claimed that it had “ample evidence from available published literature to make

informed decisions” about ovariectomy via colpotomy and that—despite the fact that the available scientific literature had not meaningfully changed between 2018 and 2020—BLM no longer found it necessary to take the experimental approach the agency had decided was appropriate only two years prior. Although BLM claimed to have considered “ample evidence” about the impacts from ovariectomy, it previously conceded that the agency has “no data” about important behavioral impacts, such as “inter- or intra-band behavior (e.g. estrous display, increased tending by stallions, etc.).” Moreover, while purporting to base its decision on “ample evidence” about ovariectomy’s impacts, BLM’s EA failed to consider that—as AWHC explained in comments—ovariectomized mares may enter estrous *permanently*, effectively becoming “teaser” mares that will overstimulate stallions and have unknown, but potentially catastrophic, consequences for the behavior of individual wild horses and wild horse herds. Likewise, BLM failed to respond to other aspects of AWHC’s comments that specifically identified scientific and veterinary input explaining that ovariectomy via colpotomy will likely have severe adverse impacts on individuals and herds.

77. In response to AWHC’s extensive comments highlighting the agency’s previous focus on evaluating the “social acceptability” of ovariectomy via colpotomy, reminding the agency that a federal district court previously found that the agency acted arbitrarily and capriciously by jettisoning that inquiry without any rational explanation, and stressing that the NAS had provided an appropriate methodology for considering this issue *in response to a commission from BLM itself*, BLM’s Comment Report issued along with its Final EA stated only the following single sentence: “BLM is not required to consider “Social acceptability” in NEPA documents or wild horse management decisions.” BLM did not provide any further explanation for why, having previously stressed the importance of this inquiry, the agency apparently no

longer cares whether the public will find the agency's treatment of federally protected wild horses acceptable. BLM did not discuss, or even acknowledge, the NAS's recommended methodology for analyzing this type of issue and provided no explanation for why it was disregarding the input the NAS provided in response to the agency's own commission.

78. BLM did not respond to AWHC's comment explaining that the agency could not lawfully issue this decision without first following through on the 1987 RMP's promise that "Herd Management Plans *will be completed* to provide detailed guidance for management of individual HMAs." However, in response to another organization's comment on a similar issue, BLM candidly conceded that "[t]his plan is not a Herd Management Area Plan."

79. BLM purported to find that "[t]he scope of this decision does not include a re-evaluation of AML or any other amendment to the management decisions reflected in the House Range RMP/ROD." BLM found that the decision "is in conformance with the BLM's House Range RMP/ROD" because the RMP "reflects BLM's decision to maintain horse numbers in the HMA within AML through 'periodic removals.'" In response to AWHC's explanation that the 1987 RMP does not authorize sterilization of wild horses, and neither authorizes nor discusses the use of ovariectomy via colpotomy, and thus that BLM would have to amend the RMP in order to proceed with ovariectomy via colpotomy, BLM asserted that its decision was in conformance with the RMP because the RMP stated that "[w]ild horses will continue to be managed in accordance with provisions of the [WHA]" and that "[s]terilization is authorized in the [WHA]." However, in making this assertion, BLM disregarded the fact that—as explained in detail in AWHC's comments—the WHA does not contain any blanket authorization for sterilizing wild horses. Instead, the only mention of sterilization in the statute comes in the context of a specific mandate that the agency must "determine whether appropriate management

levels should be achieved by the removal or destruction of excess animals, or other options (such as sterilization, or natural controls on population levels” and that “[i]n making such determinations, the [agency] shall consult” various experts including those “recommended by the National Academy of Sciences” and other individuals with “scientific expertise and special knowledge of wild horse and burro protection.” As BLM conceded in its own EA, the 1987 RMP stated that the agency would manage these wild horses’ population through “periodic removals.” The RMP did not analyze or authorize the use of sterilization as a management tool for achieving AML in the Confusion HMA. BLM thus failed to consider the plain import of AWHC’s comments, the statute itself, and the agency’s own RMP.

80. BLM’s final Decision Record and EA fail to provide any assurance that the public will be able to observe any aspect of BLM’s surgical sterilizations. BLM did not respond to AWHC’s comment explaining that the agency’s decision to perform surgeries in a private facility “seems tailor-made to impede outside and independent observation” by placing the decision as to whether to allow observation in the sole discretion of a private contractor. Instead, without providing any further explanation for why it chose to locate the procedures in a private facility and to conduct the procedures using a private contractor, BLM reiterated that “[a]s the surgery would be conducted at a private facility, general public observation of the surgical procedure would not be allowed,” but that BLM will “request that the contracted veterinarian allow observation by an unaffiliated, licensed and practicing veterinarian.” Likewise, BLM stated that it would “encourage the contracted veterinarian performing the procedure to allow a third-party observer,” without providing any explanation of what concrete steps the agency would take to ostensibly “encourage” such a decision. BLM did not provide any response to AWHC’s comments stressing that it has a First Amendment right to observe the agency’s



activities or to AWHC's reminder that it had previously secured a preliminary injunction preventing BLM from performing this same surgical procedure without providing a level of public observation that would comport with the First Amendment. Likewise, BLM did not respond to AWHC's comments explaining that small, unobtrusive cameras are readily available—at AWHC's expense—that could allow for unimpeded, meaningful public observation without compromising the safety, efficiency, or efficacy of BLM's proposed procedures.

81. Since BLM issued its decision, AWHC has been seeking additional information about BLM's decision to sterilize wild horses using ovariectomy via colpotomy. In response to a letter from AWHC's counsel, BLM estimated that it would not perform ovariectomies via colpotomy until "late spring or early summer of 2021." Additionally, BLM stated that the agency "has yet to select the facility or the licensed veterinarian" who will perform these surgical procedures. BLM did not provide any response to AWHC's questions about what steps the agency would take to encourage its contractor to allow public observation, nor provided any answer to AWHC's specific question of whether BLM would make authorization of observation a condition of its contract with the contractor the agency will hire to perform these procedures. AWHC has continued to seek information about the timing and location of BLM's surgical procedures, as well as who the agency will hire as a contractor to perform these procedures and whether the agency will allow for any meaningful public observation. However, as of the date of the filing of this Complaint, BLM has not responded to AWHC's inquiries with further details.

## **PLAINTIFFS' CLAIMS FOR RELIEF**

### **I. CLAIMS UNDER FLPMA AND THE WHA**

82. By deciding to surgically sterilize wild horses from the Confusion HMA using ovariectomy via colpotomy, BLM has made a decision that is not in conformance with the 1987 House Range RMP, which does not analyze or authorize the use of permanent sterilization of wild horses as a population management tool, and which instead commits the agency to managing the population in the Confusion HMA using BLM's historical method of periodic roundups and removals. Because BLM's decision is thus not in conformance with the guiding RMP, it is a violation of FLPMA and of BLM's own regulations implementing FLPMA.

83. By deciding to surgically sterilize wild horses from the Confusion HMA using ovariectomy via colpotomy without first completing a Herd Management Area Plan in compliance with the mandate in the 1987 RMP that "Herd Management Plans will be completed to provide detailed guidance for management of individual HMAs," BLM has made a decision that is not in conformance with the agency's own guiding RMP and is thus a violation of FLPMA and the agency's own regulations implementing FLPMA.

84. BLM's decisions harm Plaintiffs in the manner described in ¶¶ 9–24.

### **II. CLAIMS UNDER THE WHA AND ADMINISTRATIVE PROCEDURE ACT**

85. BLM's failure to consider whether ovariectomy via colpotomy is "socially acceptable" is a profound departure from the agency's previous decision to study this same issue regarding this same procedure, for which the agency has offered no rational explanation. Because this failure represents an unexplained departure from prior agency practice, a failure to consider a factor that is indisputably relevant to the agency's implementation of the Wild Horse Act, and a failure to consider important scientific information from the National Academy of

Sciences that the WHA explicitly requires the agency to consider, the failure to consider “social acceptability” is arbitrary and capricious within the meaning of the Administrative Procedure Act.

86. By failing to provide an adequate explanation for why BLM has jettisoned its previous approach of conducting scientific experiments to determine the physiological and behavioral impacts from ovariectomy via colpotomy before using it as a population management tool, BLM has demonstrated a profound and unexplained departure from the agency’s own practice that is arbitrary and capricious within the meaning of the Administrative Procedure Act.

87. By failing to provide any meaningful opportunity for public observation of its treatment of wild horses through ovariectomy via colpotomy, including by choosing to utilize a private contractor and private facility for these surgical procedures in a manner that will ostensibly not allow for any public observation and by failing to provide any rational explanation for that limitation and by failing to even consider the use of small, unobtrusive cameras to facilitate public observation, BLM has imposed significant limitations on the ability of the public to receive an independent account of the agency’s implementation of its statutory responsibilities and its treatment of federally protected wild horses that are arbitrary and capricious within the meaning of the Administrative Procedure Act.

88. BLM’s decisions harm Plaintiffs in the manner described in ¶¶ 9–24.

### **III. CLAIMS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT**

89. By failing to take a hard look at the social acceptability and humaneness of ovariectomy via colpotomy, particularly in comparison to a range of reasonable alternative forms of fertility control, and by failing to meaningfully respond to AWHC’s extensive comments on this issue, BLM has violated NEPA and its implementing regulations.

90. By failing to prepare an EIS for this decision, BLM has violated NEPA and its implementing regulations.

91. BLM's decisions harm Plaintiffs in the manner described in ¶¶ 9–24.

**WHEREFORE**, Plaintiffs respectfully request that the Court enter an Order:

1. Declaring that Defendants' decision to surgically sterilize wild horses through ovariectomy via colpotomy is arbitrary and capricious, and violates FLPMA, the Wild Horse Act, NEPA, and the APA;
2. Enjoining Defendants from taking any action to implement the surgical sterilization of wild horses from the Confusion HMA;
3. Setting aside BLM's Decision Record, Environmental Assessment, and FONSI in connection with wild horse management in the Confusion HMA;
4. Remanding the decision at issue to BLM for further analysis consistent with FLPMA, the Wild Horse Act, NEPA, and the APA;
5. Awarding Plaintiffs their reasonable attorneys' fees and costs in this action; and
6. Providing any other relief that the Court deems proper.

Respectfully submitted,

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